RECOR
AND
BRIEF

No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Petitioners,

vs.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL OPENING BRIEF

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QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

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INTRODUCTION

The First Congress invested the Alien Tort Statute ("ATS") with a geographic scope commensurate with the reach of the law of nations and treaty violations it was enacted to adjudicate. The text, history and purposes of the ATS, and this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) all confirm this. Piracy, one of the paradigmatic ATS claims, clearly occurs extraterritorially, and the ATS was understood from its earliest days to apply to acts occurring on foreign soil. Other existing doctrines are available to constrain any inappropriate exercise of jurisdiction under the ATS. There is no reason for this Court to craft a novel territorial limitation. No court has ever held that the ATS is limited to conduct occurring within U.S. territory or on the high seas. This Court should not be the first.

This Court has held that the ATS applies to tort claims against defendants present in the United States for a narrow range of egregious international law violations without any geographic restriction. *Sosa,* 542 U.S. at 724–25. Law of nations violations actionable under *Sosa* may arise anywhere in the world, including within the territory of foreign sovereigns. This was true in 1789 when the ATS was enacted; it is true today. Indeed, as *Sosa* recognized, in approving the line of cases starting with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a central purpose of modern international law prohibitions on genocide, torture and similar egregious acts is to

make eradication of such violations the concern of every member of the international community. *Sosa*, 542 U.S. at 762 (Breyer J., concurring). Support for international human rights compliance and accountability for gross violations is a longstanding cornerstone of U.S. foreign policy. The proposed territorial limitation on ATS tort claims undermines both those policies and the purposes of the statute.

Transnational tort cases are litigated regularly in our federal and state courts. Whatever issues or concerns such cases, including ATS cases, may raise are properly addressed by established and generally applicable case-specific doctrines (e.g., forum non conveniens). Any concerns about inappropriate ATS litigation can be adequately managed by these same doctrines. This Court should not craft a novel territorial limitation that is unsupported by precedent and that Congress has not seen fit to impose.

OPINIONS BELOW

The opinion of the court of appeals is reported at 621 F.3d 111 (2d Cir. 2010). *See* App. to Pet. for Cert. ("Pet. App.") A-1. The court of appeals's orders denying plaintiffs' timely petition for rehearing and for rehearing *en banc* and the opinions filed with those orders were entered February 4, 2011. Pet. App. C and D. These orders and related opinions are reported at 642 F.3d 268 (2d Cir. 2011) and 642 F.3d 379 (2d Cir. 2011). The opinion of the district court

is reported at 456 F. Supp. 2d 457 (S.D.N.Y. 2006). *See* Pet. App. B.

JURISDICTION

This Court has jurisdiction based upon 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1350 provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

1. This case was filed in 2002 by twelve Nigerian plaintiffs,[1] all legal residents of the United States. All of the plaintiffs had received political asylum here by the time the case was filed.[2] Petitioners alleged, on behalf of themselves and a

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[1] Petitioners use the terms petitioners and plaintiffs, and the terms respondents and defendants, interchangeably in this brief.

[2] The fact that some plaintiffs received political asylum is not in the current record. Plaintiffs would include such facts in an amended complaint on remand.

putative class, that respondents aided and abetted the egregious human rights violations committed against them by the Sani Abacha dictatorship in the Ogoni region of Nigeria between 1992 and 1995. The claims at issue in this appeal are torture, extra-judicial execution, prolonged arbitrary detention and crimes against humanity. J.A. 42–44, 58–73 (First Amended Complaint, ¶¶ 1–4, 32–43, 45–54, 56–57, 59, 61–75). Petitioners alleged that respondents and their agents aided and abetted widespread and systematic attacks committed against the Ogoni population and directed, in particular, at people like petitioners who opposed Shell's environmental degradation in the Niger Delta.

Respondents did not challenge the district court's personal jurisdiction over them. Nor did they bring a forum non conveniens motion.[3]

In September 2006, after discovery against Respondents had been completed, the district court denied in part and granted in part Respondents' motion to dismiss the claims in plaintiffs' First Amended Complaint. Pet. App. B. The district court certified for interlocutory appeal the issue of whether

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[3] Similar objections had been rejected in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001). Respondents contended in *Wiwa* that the case should be transferred to the UK or the Netherlands, not Nigeria. 226 F.3d at 94. The *Wiwa* case was settled in June 2009 on the eve of trial. Ed Pilkington, *Shell Pays Out $15.5M over Saro-Wiwa Killing*, The Guardian, June 8, 2009, http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa.

certain of petitioners' substantive claims were actionable under *Sosa*. Pet. App. B 21–23. That order did not address Respondents' international comity or political question arguments, nor did Respondents ever seek an interlocutory appeal from the denial of these defenses.

2. On September 17, 2010, a sharply divided Second Circuit panel held, without briefing or argument, that corporations could not be sued under the ATS for torts committed in violation of the law of nations. Pet. App. A-15. The panel did not decide any other issue. It did not reach any of the issues certified for appeal by the district court, nor did it address any issue relating to the extraterritorial reach of the ATS. Pet. App. A - 7–8 n.10. Petitioners' petition for en banc review was denied by an evenly divided vote. Pet. App. C.

3. Petitioners filed a petition for a writ of certiorari on June 6, 2011. This Court granted the petition on October 17, 2011. The questions presented upon which certiorari was granted were:

> (1) [w]hether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, or an issue of subject matter jurisdiction as the court of appeals held, and (2) [w]hether corporations are excluded from tort liability for violations of the law of nations such as torture, extrajudicial executions or other crimes against humanity, as the Second Circuit held,

> or instead may be sued in the same manner as any other private actor under the ATS for such egregious violations, as the D.C., Seventh, Ninth and Eleventh Circuits have explicitly held.

4. This Court heard argument on these questions on February 28, 2012. On March 5, 2012, the Court ordered that the case be reargued and that the parties submit supplemental briefing on the issue of

> [w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

This supplemental opening brief responds to the Court's order of March 5, 2012.

SUMMARY OF ARGUMENT

This Court posed two questions for supplemental briefing. The first was whether the ATS *ever* provided jurisdiction over claims based on conduct occurring within the territory of foreign sovereigns. *Sosa* already answered this question affirmatively by approving *Filartiga* and its progeny which exercised jurisdiction over tort claims based on serious human rights violations occurring in the

territory of foreign sovereigns. *Sosa*, 542 U.S. at 725, 731–32. Unless *Sosa* is abandoned, this Court has already rejected a categorical territorial limitation on ATS jurisdiction.

The second question, regarding the circumstances in which such cases may be brought, is answered in part by the substantial restrictions on ATS jurisdiction mandated by *Sosa*. *Id.* at 725, 732, 738. *Sosa* made clear that ATS jurisdiction is not available for all law of nations violations, but only for universally-recognized, specifically-defined norms that satisfy *Sosa*'s requirements. *Id.* Moreover, *Sosa* made clear that all ATS cases are subject to established doctrines limiting federal court jurisdiction applicable to all transnational cases. These doctrines enable lower federal courts to implement appropriately the judicial caution indicated by *Sosa* on a case-specific rather than a categorical basis.

In *Sosa*, this Court recognized that modern international human rights law bars States from committing certain egregious acts against their citizens within their own territory and endorsed the exercise of ATS jurisdiction in this context. 542 U.S. at 725, 732. *Sosa* itself arose from a claim that a Mexican citizen had been arbitrarily arrested by other Mexican citizens within Mexican territory. *Id.* at 698. Despite arguments by the United States and others as *amicus curiae* that the ATS did not apply outside the United States, *Sosa* specifically endorsed the line of cases arising from human rights violations

committed in the territory of foreign sovereigns beginning with *Filartiga*. *Id.* at 725, 732; *see also In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994) ("*Marcos II*") (applying the ATS to disappearances, torture and extrajudicial killings in the Philippines). Indeed, a portion of *Sosa*'s cautionary language was directed to the fact that the ATS could be used to address violations arising on foreign soil. *Sosa*, 542 U.S. at 727–28. No court, before *Sosa* or since, has held that ATS jurisdiction is limited to conduct occurring within U.S. territory or on the high seas.

The text, history, and purpose of the ATS support *Sosa*'s recognition that the ATS applies to a narrow range of human rights tort claims arising on foreign soil. Unlike other provisions of the First Judiciary Act, the text applies to claims by aliens and contains no territorial limits. The ATS was enacted to enforce the law of nations, which was, and is, not limited to U.S. territory.

History likewise confirms the lack of any territorial limitation on ATS actions. Piracy, one of the original Blackstone paradigms, is by definition extraterritorial. The other paradigmatic norms (attacks on ambassadors and violations of safe conducts) were not subject to territorial limits. Any argument that territorial limitations were assumed by the Founders, but left unstated, is put to rest by the 1795 opinion of Attorney General William Bradford, *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795), which clearly applies the ATS to a French

attack, aided and abetted by U.S. nationals, on the territory of Britain's Sierra Leone colony in 1794.

A central purpose of the ATS was to provide a *federal* forum for alien tort claims involving violations of international law. A categorical territorial limitation would undermine that purpose, because no equivalent limitation applies to transitory tort claims heard in state courts. The state courts were not then, and are not now, limited in the scope of their jurisdiction over claims between parties before them and would have accepted jurisdiction over transitory torts committed on foreign soil based on established common law doctrine by the time the ATS was enacted. Respondents' proposed categorical territorial limitation has no support in U.S. or international law and would only frustrate Congress's purpose by driving ATS tort cases into state courts rather than the federal forum the First Congress intended.

The canon of statutory interpretation presumptively limiting the application of statutes to U.S. territory has no application to the ATS because it is a jurisdictional statute and does not seek to enforce American norms of conduct. The ATS provides a forum for tort claims enforcing universally-recognized customary international law norms. Even if the presumption applied, it would be easily overcome given the fact that the ATS was explicitly intended to enforce the law of nations, which applies extraterritorially, including to acts of

piracy on the high seas and to conduct within the territory of foreign sovereigns.

The application of the ATS in the *Filartiga* line of cases is fully consistent with international law. The ATS is an exercise of our nation's sovereign jurisdiction to adjudicate universally-recognized international law obligations; the statute does not prescribe American norms of conduct. The fact that federal common law today provides some of the subsidiary rules in ATS cases is fully consistent with the basic international law principle, recognized in *Sosa*, that each State retains the discretion to enforce international law through its domestic legal system. *Sosa*, 542 U.S. at 729–30.

Moreover, the violations in this case – torture, extra-judicial execution, prolonged arbitrary detention and crimes against humanity – are so fundamental that every nation may assert universal jurisdiction over the perpetrators. Any restriction upon such jurisdiction would protect modern perpetrators of genocide, slavery, torture or other egregious violations present in the United States from civil accountability under the ATS – a result in conflict with the core purposes of the statute.

Finally, there are well-established doctrines available to circumscribe ATS jurisdiction on a case-specific basis. Federal courts may exercise general jurisdiction only where a defendant has sufficient contacts with the forum to satisfy constitutional due process requirements. The federal courts routinely

employ an array of other established, generally-applicable doctrines to limit the adjudication of transnational cases where the disputes are more appropriately heard in another forum, when such litigation creates international friction, or when it creates conflict between the judiciary and the political branches. These case-specific doctrines, along with the substantive limits mandated by *Sosa*, adequately address concerns about any particular ATS case.

By contrast, a categorical bar on actions arising on foreign soil would be unprecedented under U.S. law and would prevent the adjudication of claims where the victims or perpetrators are U.S. nationals, where the foreign sovereign or our own government supports the suit, or where there is no adequate alternative forum available to adjudicate the claim. This Court should not enact a categorical territorial bar, particularly when Congress has chosen not to limit ATS jurisdiction in any way since the Judiciary Act of 1789.

ARGUMENT

I. *SOSA* RESOLVED THE QUESTION OF WHETHER THE ATS EXTENDS TO SERIOUS LAW OF NATIONS VIOLATIONS OCCURRING IN THE TERRITORY OF FOREIGN SOVEREIGNS.

In *Sosa*, this Court endorsed the modern line of cases beginning with *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980), virtually all of which alleged claims by non-citizen plaintiffs, arising from egregious international human rights violations occurring within the territory of foreign sovereigns. *Sosa*, 542 U.S. at 732. In so doing, this Court recognized that the 21st century law of nations includes fundamental human rights norms of the same quality and character as the paradigmatic norms known to the Founders and meant to be enforced under the ATS. *Id.*

In *Filartiga*, the plaintiffs were Paraguayan nationals, one of whom was a U.S. resident. The defendant, a former Paraguayan police official, was served with process in the United States where he was living despite an expired visa. The torture at issue occurred in Paraguay. *Filartiga*, 630 F.2d at 878. In *Marcos II*, 25 F.3d at 1469, the plaintiffs were Philippine citizens who brought torture, summary execution and disappearance claims arising within the Philippines against former Philippine President Ferdinand Marcos. *Sosa* explicitly recognized both *Filartiga* and *Marcos* as being

consistent with its holding and analysis. *Sosa*, 542 U.S. at 732 (recognizing that *Sosa*'s "limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court" and citing *Filartiga* and *Marcos II*).

The *Sosa* Court recognized that international law has always applied to acts beyond our borders (*e.g.* piracy) and that the modern law of international human rights applies when state officials, or in some cases private actors, violate certain universally agreed upon norms, even when committed wholly within their own territory. *Sosa*, 542 U.S. at 727. A central feature of the modern law of international human rights is that violations taking place in the territory of foreign sovereigns are now subject to international scrutiny and may give rise to obligations upon which all States may or even must act.

Sosa's recognition that the ATS applies to certain human rights violations arising on foreign soil was not inadvertent. *Sosa* involved a claim by one Mexican citizen against another for acts committed entirely within Mexico, *id.* at 698, 704, and the claim that the ATS did not apply outside U.S. territory was briefed and argued.[4] Transcript of Oral Argument at 39–40, *Sosa v. Alvarez-Machain*, 542

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[4] *See, e.g.*, Brief for the United States as Respondent Supporting Pet. at 46–50, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339, 03-485), 2004 WL 182581.

U.S. 692 (2004) (No. 03-339, 03-485). Acceptance of the argument that the ATS lacked extraterritorial application would have ended the case without consideration of the merits of Dr. Alvarez's claims. Indeed, Dr. Alvarez's claims against the United States under the Federal Tort Claims Act were dismissed *because* they arose in Mexico. *Sosa*, 542 U.S. at 699.

Although the *Sosa* Court limited the circumstances in which the ATS applied, it did *not* impose a categorical territorial limitation. Rather, this Court recognized that historically, the ATS had applied to extraterritorial norms like piracy and that modern international law necessarily applied to conduct on foreign soil. *Id.* at 727–28 (discussing possible collateral consequences to U.S. foreign relations). The Court's solution was to urge caution in applying the ATS to human rights claims by providing that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732.

Similarly, *Sosa* took note of the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2006) ("TVPA"), which explicitly applies to torture and extra-judicial executions committed by foreign officials or under the color of foreign authority. *Sosa*, 542 U.S. at 728. Congress enacted the TVPA with the clear understanding that the ATS had an

extraterritorial reach,[5] and sought to "supplement" the tort remedies provided by the *Filartiga* line of cases under the ATS. *Id.* at 731.[6]

Neither *Sosa* nor Blackstone found territorial limits on the paradigmatic Blackstone norms. As the *Sosa* Court acknowledged, the ATS was enacted partly to address the inability of the federal government to respond to the Marbois incident involving an attack on the French consul. *Sosa*, 542 U.S. at 716–18. There is no evidence that Congress would have been unconcerned with providing a

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[5] Both houses of Congress clearly approved of the extraterritorial application of the ATS. The Senate report on the TVPA stated that "[s]ection 1350 has other important uses and should not be replaced," citing *Filartiga* with approval. S. Rep. No. 102-249, at 4 (1991). The report recognizes that under international law, States have the option to provide for private remedies for violations of international law abroad. *Id.* at 5. The House report also approved of *Filartiga* and disapproved of *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). H.R. Rep. No. 102-367(I), at 4 (1991). The United States has also repeatedly emphasized in its reports to international human rights bodies that the ATS has an extraterritorial reach. *See, e.g.*, Initial Report of the United States of America, CAT/C/28/Add. 5, ¶ 277 (Feb. 9, 2000) ("U.S. law provides statutory rights of action for civil damages for acts of torture occurring *outside* the United States. One statutory basis for such suits, the [ATS] . . . represents an early effort to provide judicial remedy to individuals whose rights had been violated under international law.") (emphasis in original).

[6] Nothing in this Court's recent decision in *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012), suggests that the TVPA limits the scope of ATS jurisdiction in any way.

federal forum to redress the Marbois incident had the attack occurred in London, and the attacker subsequently sought sanctuary in the United States. Indeed, using language commonly applied to piracy, the Pennsylvania Supreme Court that convicted Marbois's assailant observed that he who assaults a public minister "hurts the common safety and well being of nations; he is guilty of a crime against the whole world." *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (Pa. 1784). Harboring the attacker and failing to provide a forum to redress such a violation would have created precisely the diplomatic problem the ATS was enacted to prevent.

Sosa identified other means of exercising judicial caution in ATS cases. These included case-specific doctrines such as the political question doctrine, international comity, and perhaps the exhaustion of local remedies. *Sosa*, 542 U.S. at 733 n.21 (majority opinion), 761 (Breyer, J., concurring). The Court engaged in this discussion precisely because it understood that the ATS applies to conduct occurring on foreign soil. There would be no need to consider international comity or an exhaustion of local remedies requirement if the ATS applied only to acts occurring outside the territory of foreign sovereigns.[7]

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[7] This Court's reference to applying case-specific deference in the context of ATS cases against corporations complicit in apartheid would also have been superfluous if the ATS did not apply at all to claims arising within South Africa. *Id.* This Court's response to South Africa's objections to those ATS suits was the suggestion that case-specific deference might

There are no ATS decisions, before or after *Sosa*, restricting the ATS to claims arising within U.S. territory or on the high seas. Every circuit to consider this issue has rejected the argument that the ATS does not apply extraterritorially. *See Filartiga*, 630 F.2d at 885; *In re Marcos Human Rights Litig.*, 978 F.2d 493, 499–501 (9th Cir. 1992) ("*Marcos I*"); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744–47 (9th Cir. 2011) (en banc); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 20–28 (D.C. Cir. 2011); *Flomo v. Firestone Natural. Rubber Co.*, 643 F. 3d 1013, 1025 (7th Cir. 2011).

Virtually all of these cases involved human rights claims arising from conduct occurring within the territory of foreign sovereigns and the consideration of defenses and immunities (e.g., the act of state doctrine) that arise only in that context. Only by overturning the core analysis in *Sosa* and its application of the ATS to modern human rights cases could this Court impose categorical territorial limitations on the ATS. There is no reason for this Court to do so.[8] Congress can restrict the scope of the

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be appropriate. *Sosa*, 542 U.S. at 733 n.21.

[8] *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (affirming a "presumption of adherence to our prior decisions construing legislative enactments").

ATS at any time. It has not done so in the thirty-two years since *Filartiga*.

II. THE TEXT, HISTORY, AND PURPOSES OF THE ATS DEMONSTRATE THAT THERE IS NO CATEGORICAL TERRITORIAL LIMITATION ON ATS JURISDICTION.

The text of the ATS places no territorial limit on the scope of ATS jurisdiction. The ATS applies to "any civil action"[9] and provides jurisdiction over "private causes of action for certain torts in violation of the law of nations." *Sosa*, 542 U.S. at 724. By providing jurisdiction for "tort" claims in violation of the law of nations the Founders necessarily meant to provide for jurisdiction over extraterritorial transitory torts that could arise on foreign soil. The statute's reference to the "law of nations" and treaties underscores that the Founders intended the ATS to have a territorial reach co-extensive with the law of nations or the treaty provisions that it was designed to enforce.

The history of the ATS demonstrates that it was enacted to provide a federal forum to adjudicate tort actions brought by aliens who had suffered

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[9] As originally enacted, the ATS encompassed "all causes," stating that federal district courts "shall . . . have cognizance concurrent with the courts of the several States, or the circuit courts . . . of all causes where an alien sues for tort only in violation of the law of nations . . . ." Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

damages from violations of the law of nations.[10] A primary purpose of the ATS was to insulate such aliens from parochial prejudices of the state courts. *See Sosa*, 542 U.S. at 722 (noting that state common law recognized remedies for international law violations). State courts recognized the well-established transitory tort doctrine in English common law.[11] An artificial territorial limitation on ATS jurisdiction would have forced foreign plaintiffs into state courts, precisely the opposite of what the First Congress intended.

The transitory tort doctrine, which was well-established and recognized by 18th century American courts, makes clear that the ATS is unfettered by implied geographic limits. *See also* 3 William Blackstone, *Commentaries on the Laws of England* 384 (1758) ("All over the world, actions transitory follow the person of the defendant . . . ."). Transitory torts could and did arise within the territory of foreign sovereigns. Once personal jurisdiction was established, early American courts had no difficulty

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[10] *See Sosa*, 542 U.S. at 716 ("The Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.' . . . and in 1781 the Congress implored the States to vindicate rights under the law of nations." (quoting J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893))).

[11] *See, e.g., Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. Super. Ct. 1786); *Gardner v. Thomas*, 14 Johns 134 (N.Y. Sup. Ct. 1817); *Johnson v. Dalton*, 1 Cow. 543 (N.Y. Sup. Ct. 1823).

adjudicating such claims without raising concerns that such cases improperly treaded on the sovereignty of foreign States.

Moreover, the 18th century legal expert Emmerich de Vattel confirmed in his influential treatise *The Law of Nations* that a foreign nation's sovereignty was not compromised by the adjudication of extraterritorial claims for piracy and other heinous crimes that were justiciable wherever the perpetrator could be found:

> [T]hat, although the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations by trampling under foot the foundations of their common safety. Thus, pirates are sent to the gibbet by the first into whose hands they fall.

1 Emmerich de Vattel, *The Law of Nations*, ch. 19, §233 (T. & J. W. Johnson eds., Joseph Chitty trans., 1852).[12]

A. The Text of the ATS Demonstrates Congress's Intent to Establish Jurisdiction Over Certain Extraterritorial Tort Claims.

The text of the ATS contains "no limitations as to . . . the locus of the injury."[13] *Marcos I*, 978 F.2d at 500. This is true for both treaty and law of nations violations.

When Congress sought to circumscribe the territorial scope of jurisdiction in the Judiciary Act of 1789, it did so explicitly. The language of the ATS stands in sharp contrast to other clauses of Section 9 of the Judiciary Act of 1789—notably the first and second—which conferred jurisdiction subject to

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[12] This Court has recognized that the Founders considered Vattel's *Law of Nations* to be the most authoritative treatise on the law of nations. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978). ("The international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel." (citing 1 J. Kent, *Commentaries on American Law* 18 (1826))).

[13] *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[A] court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says . . . .").

express geographical limitation.[14] Thus, read in conjunction with the rest of Section 9, the lack of any territorial limit in the ATS in and of itself demonstrates congressional intent not to impose a categorical territorial limitation on the ATS. *See* William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 Harv. Int'l L.J. Online 35, 40 (2010) ("*Prescriptive Jurisdiction Fallacy*").

Moreover, the plain meaning of every phrase employed in the ATS further demonstrates that it applies to violations occurring abroad:

"Cognizance"/"Jurisdiction." – Jurisdiction of courts, then as now, is not limited to claims arising within United States territory.

"All Causes"/"Any Civil Action." – The term "any," and the original use of "all," indicate the absence of any implied limitation beyond those expressed in the text. If Congress sought to exclude claims implicitly, it would not have expressly included "all" of them. When read in conjunction with the transitory tort doctrine, *see infra* §II(C), and the statute's explicit purpose to enforce international law, there is no reason to believe that

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[14] *Compare* Judiciary Act of 1789, ch.20, §9, 1 Stat. 73, 76–77 (providing jurisdiction over "all crimes and offences that shall be cognizable under the authority of the United States, *committed within their respective districts, or upon the high seas*") (emphasis added).

Congress meant to exclude law of nations violations occurring within a foreign State.

"[B]y an alien." – This Court has expressly held that the term "alien" as used in the ATS includes non-citizens living abroad. *Rasul v. Bush*, 542 U.S. 466, 484 (2004). The plain meaning of "any" cause brought by a non-citizen living abroad includes claims that arise outside the United States.

"[F]or a tort only." – The term "tort" necessarily includes torts committed abroad, because "tort[s]" at the time the ATS was passed, as now, were understood to be transitory. Indeed, the presumption that all torts were transitory was so strong that only explicit statutory authority could rebut it. *Mostyn v. Fabrigas* (1774) 98 Eng. Rep. 1021 (K.B.) 1030; 1 Cowp. 161, 177 ("[T]he place of transitory actions is never material, except where by particular Acts of Parliament it is made so . . . ."). *See* § II(C), *infra*. The transitory tort doctrine is a basic assumption of our common law. *Filartiga*, 630 F.2d at 885 (applying transitory tort doctrine to ATS). Thus, the ATS's reference to "torts" plainly includes transitory torts arising on foreign soil.

"[C]ommitted in violation of the law of nations." – At the time the ATS was passed, it was understood that "all . . . trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained . . . ." *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159–60 (1795) (opinion of Iredell,

J.). The law of nations by definition was universal and applied within every sovereign's territory.[15]

In sum, the ATS applies to "any" suit by a non-citizen for transitory tort claims based on universally-recognized law of nations norms that were well-understood to be actionable wherever the tortfeasor could be found. The text leaves no doubt that ATS jurisdiction applies to conduct outside the United States, including conduct on foreign soil. *Sosa*'s application of the ATS to egregious human rights violations arising on foreign soil is mandated by the text of the ATS.

B. The Historical Context and Purposes of the ATS Negate Any Territorial Limitation.

Sosa engaged in an extensive analysis of the historical context and purpose of the ATS to determine its meaning and scope. 542 U.S. at 714–20. The historical sources cited in *Sosa* do not support reading a territorial limitation into the ATS.

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[15] *See United States v. Dire*, No. 11-4310, 2012 WL 1860992, at *16–17, *41 (4th Cir. May 23, 2012) (in piracy statute, Congress referred to the law of nations explicitly to encompass all acts of piracy regardless of territorial jurisdiction in which they occurred). *Cf. United States v. Smith*, 18 U.S. (5 Wheat.) 153, 155, 177 (1820).

The availability of ATS tort jurisdiction was one of the First Congress's solutions to the inability of the Continental Congress to respond to violations of the law of nations. *Id.* at 716; *see* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490 (1986).

In passing the ATS, the First Congress intended to make a federal forum available for torts committed in violation of the law of nations. The Founders put their trust in the federal courts to resolve such disputes and thereby to advance the diplomatic interests of the new Nation.[16] 2 Emmerich de Vattel, *The Law of Nations* ch. 6, § 71 (stating a private remedy for foreigners' injuries by violations of international or domestic law was an essential means of reducing friction between nations).

Sosa identified piracy as one of the paradigmatic torts actionable under the ATS. *Sosa*, 542 U.S. at 720. Because unlawful attacks in the territory of a foreign State created the same potential for war as attacks on foreign flagged ships, the Founders would not have drawn a categorical distinction between extraterritorial acts on the high seas and acts committed on foreign territory.

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[16] *See* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 464 (1989).

Sosa determined that Congress intended the ATS to apply to at least two other categories of alien tort claims that could arise outside U.S. territory: violations of safe conduct and infringement of the rights of ambassadors. 542 U.S. at 714. These norms also were not limited geographically to offenses that occurred within U.S. territory.

Violations of safe-conducts granted by the United States could occur outside U.S. territory.[17] Marbois, the French Consul, was attacked in Philadelphia, but if he had been assaulted in London and his attacker had been found in the United States, the ATS would have provided jurisdiction. Such an attack on an ambassador would have been a violation of the law of nations regardless of the location of the incident and the United States would not have provided a safe haven for the perpetrator, whether a U.S. citizen or not. The Court emphasized this point in *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (Pa. 1784), the case arising out of the Marbois Incident, in language similar to the language used to describe piracy: "The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well being of nations; he is guilty of a crime against the whole world."

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[17] 4 William Blackstone, *Commentaries on the Laws of England*, 69 (1769) (noting that violations of safe conducts could occur at sea).

The reference in the ATS to the "law of nations," – a law which applies in every country – indicates Congressional intent that the ATS provide a federal forum for torts occurring abroad. Congress would not have intended to force victims of such violations to sue in state courts. The First Congress did not intend for the United States to become a sanctuary for the "enemies of all mankind," or to relegate such tort claims implicating international law violations to state courts.

C. The First Congress Presumed the Transitory Tort Doctrine Applied to Torts in Violation of the Law of Nations.

The transitory tort doctrine, inherited from English common law upon this nation's founding, allows for suit against a tortfeasor regardless of where the cause of action arises, so long as personal jurisdiction is satisfied. *See, e.g., Rafael v. Verelst*, (1776) 96 Eng. Rep. 621 (K.B.) 622–23; 2 Black. W. 1055, 1058 (noting that "personal injuries are of a transitory nature"). The tortfeasor owed an obligation to the victim that could be enforced wherever the tortfeasor was found, regardless of where the tort occurred. *Id.*

In *Fabrigas*, the leading transitory tort case of the era, Lord Mansfield held that an English common-law court could adjudicate a claim by a "native Minorquin" against the governor for assault,

false imprisonment, and deportation to Spain.[18] 98 Eng. Rep at 1021. As Lord Mansfield emphasized, "as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas." *Id.* at 1032.[19]

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[18] It has been suggested that the *Fabrigas* holding is more limited because the claims arose in Minorca, then an English colony. *Sarei*, 671 F.3d at 805–06 (Kleinfeld, J. dissenting). Lord Mansfield left open the question of whether an assault between two foreigners in France involving a breach of the peace could be adjudicated in England. But any uncertainty on this point was removed two years later in *Rafael v. Verelst*, which, as this Court described it, "was a trespass committed in the dominions of a foreign prince." *McKenna v. Fisk*, 42 U.S. (1 How.) 241, 248 (1843). This Court left no doubt: "the courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions." *Id.* at 249 ; *see also* Moffat Hancock, Torts in the Conflict of Laws 3 (1942) (noting *Verelst* as counter example to dicta from *Fabrigas*).

[19] The principle that tort claims may be brought wherever the tortfeasor is found has an ancient heritage. *See, e.g., Dutton v. Howell*, (1693) 1 Eng. Rep. 17 (H.L.) 21; *Cartwright v. Pettus*,(1675) 22 Eng. Rep. 916 (Ch.); 2 Chan. Cas. 214. Perhaps the oldest English precedent is Skinner's case. *The Case of Thomas Skinner, Merchant v. The East-India Company* (1666) 6 State Trials 710, 711 (H.L.) (awarding tort damages for assault and other injuries for an extraterritorial tort).

This principle was applied by 18th century American courts. Oliver Ellsworth, the author of the ATS, applied this doctrine as a judge in *Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. Super. Ct. 1786) ("Right of action against an administrator is transitory, and the action may be brought wherever he is found.").[20]

This Court has repeatedly applied the transitory tort doctrine. *See, e.g., McKenna*, 42 U.S. at 247–49; *Dennick v. Central R.R. of N.J.*, 103 U.S. 11, 18–19 (1880); *Burnham v. Superior Court*, 495 U.S. 604, 637–40 (1990) (plurality).[21] Under this

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[20] *Taxier v. Sweet*, 2 U.S. (2 Dall.) 81, 83–84 (Pa. 1766) (affirming jurisdiction over claim for seizure of ship on the high seas; plaintiff argued transitory actions are triable anywhere); *Watts v. Thomas*, 5 Ky. 458, 458 (1811); *Burnham v. Superior Court*, 495 U.S. 604, 610–11 (1990) (plurality) (English common-law practice "sometimes allowed 'transitory' actions, arising out of events outside the country" (citing *Fabrigas* and *Cartwright*)); *Pease v. Burt*, 3 Day 485, 488 (Conn. 1806); *Livingston v. Jefferson*, 15 F. Cas. 660, 664 (C.C.D Va. 1811) (No. 8411) (Marshall, Circuit J.) (citing *Fabrigas* for the principle that "an action for a personal wrong . . . is admitted to be transitory"); *Gardner v. Thomas*, 14 Johns. 134, 137–38 (N.Y. Sup. Ct. 1817); *Johnson v Dalton*, 1 Cow. 543, 548 (N.Y. Sup. Ct. 1823).

[21] *See also Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904) (adjudicating claim for a tort that occurred in Mexico); *Cuba R.R. v. Crosby*, 222 U.S. 473, 477–78 (1912) (adjudicating tort claim for acts that occurred in Cuba); *Panama Elec. Ry. v. Moyers*, 249 F. 19 (5th Cir. 1918) (adjudicating tort claim for acts that occurred in Panama); *Galu v. Swissair: Swiss Air Transp. Co.*, 873 F.2d 650 (2d Cir. 1989) (adjudicating claim for a tort that occurred in Switzerland); *Cooper v. Meridian Yachts*

doctrine, "[i]t is no objection that all the parties to the suit are aliens or non-residents, and that the cause of action arose abroad." *Dennick*, 103 U.S. at 18–19; Justice Story, *Commentaries on the Conflict of Laws* §§ 543, 554 (3d ed. 1846) ("[B]y common law[,] personal actions, being transitory, may be brought in any place, where the party defendant can be found.").[22]

In deciding transitory tort cases U.S. courts are simply adjudicating the legal obligations supplied by foreign law. In all ATS cases the tortfeasor is held to universally-recognized standards supplied by customary international law governing the underlying wrongful conduct. *Sosa*, 542 U.S. at 724. This is so even if U.S. federal common law provides

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Ltd., 575 F.3d 1151 (11th Cir. 2009) (adjudicating tort claim for acts that occurred in the Netherlands).

[22] 1 William Tidd, *The Practice of the Court of King's Bench in Personal Actions*, 546 (3d ed., corr. and enl. London, 1803 ("Where the cause of action arises out of the realm, the court will not change the venue; because the action may as well be tried in the county where the venue is laid[.]"); *see also Rea v. Hayden*, 3 Mass. 24, 26 (1807) ("The action is transitory, the [British] plaintiff counting on a promise made by the [British] defendant to him at Charlotte-Town [in Nova Scotia], to wit, at said Boston."); *Field v. Thompson*, 1 Del. Cas. 92, 92 (Com. Pl. 1796) ("Trespass for boarding and entering a pilot boat etc. at Philadelphia, to wit, at Sussex County etc."); *Barriere v. Nairac*, 2 U.S. (2 Dall.) 249 (Pa. 1796) ("[A]t Cape Francois, to wit, at the County aforesaid [Philadelphia]") (reprinting opinion below); *Lawler v. Keaquick*, 1 Johns. Cas. 174 (N.Y. Sup. Ct. 1799) ("at Bourdeaux, in the republic of France, to wit, at the city, ward, and within the county aforesaid [New York.]") (pleadings).

some of the rules governing the litigation because the international system assumes that domestic legal systems will use their own remedial systems to enforce international law.

D. The 1795 Bradford Opinion Demonstrates That the Founders Perceived No Territorial Limitation on the Scope of the ATS.

The 1795 opinion issued by Attorney General William Bradford is contemporaneous confirmation that the ATS was understood from the beginning to apply to conduct on foreign soil. 1 Op. Att'y Gen. 57 (1795). This Court recognized the significance of the Bradford opinion in *Sosa*. 542 U.S. at 721. Interpreting the ATS shortly after its enactment, Bradford found that a foreign plaintiff could bring tort claims under the ATS against perpetrators of an attack within the territory of the British colony of Sierra Leone.

As Bradford described the complaint, "certain American citizens trading to the coast of Africa, on the 28th of September last, voluntarily joined, conducted, aided and abetted a French fleet in attacking the settlement and plundering or destroying the property of British subjects on that coast." 1 Op. Att'y Gen. at 58. Before turning to the ATS, Bradford considered whether the Americans could be prosecuted *criminally* in U.S. courts. He concluded that they could insofar as their acts occurred in the United States. *Id.* But insofar "as

the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them in the United States." *Id.*[23] Finally, with respect to prosecutions for acts on the high seas, he expressed "some doubt," because of the wording of the Neutrality Act. *Id.* at 58–59.

Turning to consider civil suits, Bradford emphasized "[b]ut there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." *Id.* at 59 (emphasis in original).

Some have incorrectly suggested that Bradford was referring to civil claims arising on the high seas,[24] but "these acts of hostility" plainly refers to the acts Bradford described earlier as "attacking the settlement and plundering or destroying property of British subjects on that coast." 1 Op. Att'y Gen. at 58. The diplomatic correspondence between Great Britain and the United States upon which Bradford

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[23] The panel below mistakenly suggested that this quotation referred to civil jurisdiction, *see* Pet. App. A-64, n.44, although it occurs in the middle of Bradford's discussion of criminal prosecutions.

[24] *Exxon*, 654 F.3d at 80–81 (Kavanaugh, J., dissenting).

relied, which is attached in the Appendix hereto, confirm that the attack involved the pillaging and destruction of the colony within the territory in Sierra Leone occurring over a two week period.[25] Bradford's discussion of criminal and civil jurisdiction is consistent with the doctrine of transitory torts. *See Rafael*, 96 Eng. Rep. at 622–23; *see also Prescriptive Jurisdiction Fallacy* at 35, 39–41.

The Bradford opinion demonstrates that the Founding generation understood the ATS to apply to law of nations violations committed on the territory of a foreign sovereign. The U.S. response to such a charged international incident was to ensure that a federal judicial forum was available for the resolution of the dispute.

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[25] Letter from George Hammond to the Department of State (June 25, 1795) and accompanying Memorial in the National Archives, the General Records of the Department of State, Notes from the British Legation in the United States to the Department of State, 1791–1906, Microfilm M-50, Roll 2. Petitioners have included transcriptions of these documents in the Appendix hereto as App. A and B. The Bradford opinion expressly notes its reliance on these materials as the basis of the opinion. 1 Op. Att'y Gen. at 58.

E. The Presumption Against Extraterritoriality Does Not Apply to the ATS. If It Did, the Presumption Would Be Overcome by the Text, History and Purpose of the ATS.

1. The Presumption Does Not Apply to Jurisdictional Statutes.

This Court has held that the ATS is "strictly jurisdictional." *Sosa*, 542 U.S. at 713. The presumption against extraterritoriality does not apply to jurisdictional statutes or to the jurisdictional provisions in statutes. It applies only to the extraterritorial reach of American substantive law. Thus, in *Morrison v. Australia National Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010), this Court did not apply the presumption to the jurisdictional provisions of the Securities Act. This Court distinguished between the jurisdiction to adjudicate the case and the *substantive* regulation of conduct prescribed by U.S. securities regulation, and only restricted the territorial reach of the latter. *Id.*

Similarly, the presumption has never limited the reach of other jurisdictional provisions such as 28 U.S.C. § 1332 or 28 U.S.C. § 1331. *See Exxon*, 654 F.3d at 23. Diversity actions routinely involve events taking place within the territory of foreign states. *See, e.g., Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 124 (1904); *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999).

Moreover, the comity concerns underlying the presumption do not apply because in ATS cases the federal courts are enforcing universally-recognized international standards of conduct, not attempting to impose standards of conduct prescribed by U.S. substantive law. *See E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (noting that the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord").

2. The Presumption Does Not Distinguish Between Extraterritorial Conduct On the High Seas and Conduct Within the Territory of Foreign Sovereigns.

There is no doubt that the ATS applies to piracy. *Sosa*, 542 U.S. at 715, 720. However, if the presumption against extraterritoriality applied, it would exclude conduct outside the United States, including all conduct occurring on the high seas. The presumption has never distinguished between extraterritorial acts on the high seas and acts on foreign soil.[26] The issue has always been whether a

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[26] *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173–74 (1993) (declining to apply Immigration and Nationality Act to high seas based on presumption); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) (applying presumption to the high seas); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) (same).

statute was limited to acts occurring within U.S. territory. Petitioners are aware of no case recognizing a statutory presumption that applies only against the applicability of U.S. law to conduct occurring in the territory of foreign sovereigns. As the D.C. Circuit recently observed, it makes no sense to apply a new canon of statutory construction to a statute enacted in 1789. *Exxon*, 654 F.3d at 22.

3. Even If the Presumption Against Extraterritorial Application of Statutes Applies to the ATS, That Presumption Would Be Easily Rebutted.

Nor can the presumption against extraterritoriality plausibly be applied to the ATS. The presumption is based on an assumption that Congress "is primarily concerned with domestic conditions." *Aramco*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

The ATS was plainly addressed to the new Nation's role in the international community and to international concerns that did not stop at our shores. As demonstrated in § II(A) and (B), *supra*, the text and context of the ATS clearly demonstrate that the ATS was intended to apply to conduct outside U.S. territory, including piracy. And, as noted above, the Bradford opinion reveals the Founders' intent that the ATS apply to conduct beyond U.S. territory and within the territory of a foreign sovereign. 1 Op. Att'y Gen. at 59.

As this Court recognized in *Morrison*, 130 S. Ct. at 2877, the presumption against extraterritoriality is "a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate." Moreover, this Court emphasized that the presumption is not a "clear statement rule." *Id.* at 2883. "Assuredly context can be consulted as well." *Id.*[27] The text and context of the ATS overcome the presumption against extraterritoriality.

III. THE APPLICATION OF THE ATS TO SERIOUS HUMAN RIGHTS VIOLATIONS ARISING IN FOREIGN TERRITORY DOES NOT VIOLATE INTERNATIONAL LAW.

A. All Nations Have the Authority to Adjudicate Civil Claims Brought by Parties Within Their Jurisdiction.

No doctrine of international law prevents U.S. courts from adjudicating transitory tort claims between parties within our borders, much less those

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[27] *See, e.g., United States v. Belfast*, 611 F.3d 783, 811 (11th Cir. 2010) ("Intent[ ] [of extraterritorial applicability] of course may appear on the face of the statute, but it may also be 'inferred from . . . the nature of the harm the statute is designed to prevent,' from the self-evident 'international focus of the statute,' and from the fact that 'limiting [the statute's] prohibitions to acts occurring within the United States would undermine the statute's effectiveness.'" (quoting *United States v. Plummer*, 221 F.3d 1298, 1310 (11th Cir. 2000)).

alleging violations of the law of nations.[28] The application of the ATS to civil claims for torts occurring in the territory of foreign States is authorized under international law based on jurisdiction to adjudicate. Restatement (Third) of Foreign Relations Law ("Restatement Third") § 421 (1987); *see Prescriptive Jurisdiction Fallacy* at 37.

Jurisdiction to adjudicate is the inherent power of a State to "subject persons or things to the process of its courts . . . whether in civil or in criminal proceedings." Restatement Third § 401(b). It is the international law analog of personal jurisdiction. *See id.* § 421, Reporters' Note 2. Adjudicative jurisdiction is considered lawful under international law if exercised on certain bases, including presence, residence, consent or actions taken abroad with foreseeable consequences in the United States. *Id.* § 421(2)(a),(c),(g),(j). These requirements are similar to those required under our Due Process Clause. *Id.* §

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[28] Several of respondents' *amici* argue that a territorial limitation on ATS jurisdiction is required by the *Charming Betsy* principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See, e.g.*, Brief of Chevron Corp. et al, as *Amicus Curiae* in Support of Respondents (No. 10-1491) (filed Feb. 3, 2012) ("*Chevron Amicus Br.*"), at 29. However, since there is no conflict between international law and the scope of ATS jurisdiction recognized in *Sosa* and the *Filartiga* line of cases, the *Charming Betsy* principle does not apply to limit ATS jurisdiction. If anything, the *Charming Betsy* principle reinforces the exercise of ATS jurisdiction to enforce violations of the law of nations.

421, Reporters' Note 1. There is no question that U.S. personal jurisdiction standards in cases such as this one meet the requirements for the exercise of adjudicative jurisdiction under international law; any objections on that score should be addressed as objections to personal jurisdiction.

That the ATS represents an exercise of adjudicative jurisdiction is confirmed in its roots in the transitory tort doctrine understood by our Founders and applied today. In ATS cases it is not American law that defines the conduct violating the law of nations for which plaintiffs seek redress. Customary international law proscribes such conduct whether committed in Nigeria, the United Kingdom, the Netherlands or the United States. ATS claims mirror transitory tort claims in that the source of law applied to the conduct at issue is customary international law, rather than the municipal law of any one nation. *See Sosa*, 542 U.S. at 724 (applying customary international law in ATS cases). Thus, the ATS allows federal courts to exercise adjudicative jurisdiction over this narrow class of transitory torts, applying the law of nations to adjudicate the parties' substantive rights, and having federal common law supply the other rules necessary to govern the conduct of the litigation.

The fact that *Sosa* calls for the application of customary international law through a federal common law cause of action does not change the substantive international law rules to be applied or convert their application into an exercise of

prescriptive jurisdiction.[29] The availability of a federal common law cause of action under *Sosa* for torts in violation of universally-recognized human rights norms is an exercise of adjudicative, not prescriptive, jurisdiction.[30]

ATS actions enforce universally-recognized norms of customary international law binding in every country through the domestic mechanism of federal common law, not substantive norms of American public law prescribed by Congress. *Sosa*, 542 U.S. at 724–25. Indeed, under *Sosa*, the ATS applies only to norms supported by a high level of universality and specificity. The exercise by U.S. courts of jurisdiction to enforce universally-recognized customary international law norms is a legitimate exercise of adjudicative jurisdiction.

Moreover, any suggestion that the United States lacks a sufficient nexus to adjudicate ATS claims arising abroad also fails because the parties are present in the United States and customary international human rights norms are *erga omnes*—obligations owed to all states. Restatement Third §

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[29] Prescriptive jurisdiction is "the authority of a state to make its *substantive laws* applicable to particular persons and circumstances." *See* Restatement Third pt. IV, intro. note (emphasis added). *Cf.* Restatement (Second) of Conflict of Laws § 124 (1971) ("The local law of the forum determines the form in which a proceeding may be instituted on a claim involving foreign elements.")

[30] *Compare* Restatement Third § 401(a) *with* § 401(b).

702 cmt. o. All states "have a legal interest" in the protection of such rights. *Barcelona Traction, Light and Power Co., (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5). Accordingly, "any state may pursue remedies for their violation, even if the individual victims were not nationals of the complaining state and the violation did not affect any other particular interest of that state." Restatement Third § 703 cmt. b; *see also* 1 Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law* 469–70, n.23 (9th ed. 1992) (recognizing universal jurisdiction over certain offenses and citing *Filartiga*).

B. The Provision of Civil Remedies for the Violation of Fundamental International Human Rights Is Fully Consistent with International Law.

No international law principle bars any State from providing domestic mechanisms for civil suits in its courts to redress grave violations of human rights occurring in the territory of foreign sovereigns. Indeed, many, if not most States provide civil, and often criminal or administrative, remedies for such violations. *See infra* § III(C).

International human rights law arose out of the ashes of World War II, based on the collective action of the international community to end atrocities, such as genocide, torture and crimes against humanity. States determined that it was in their collective national interests to undertake joint and several action to eliminate human rights

violations threatening international peace and security. Violations of human rights norms, including violations arising within the territory of foreign sovereigns, have enormous international implications and other States often pay the cost of such violations. *See Filartiga*, 630 F.2d at 890; *see also* Louis Henkin, *The Age of Rights* 51 (1990).

This case illustrates the international dimension of human rights violations. Human rights violations in the Niger Delta have not respected Nigerian borders. Their transnational ramifications have included undermining American energy and national security policies.[31] Moreover, these violations forced plaintiffs to flee persecution in their homeland to the sanctuary of a United Nations refugee camp and then to seek political asylum in the United States. Our government has recognized plaintiffs' persecution in Nigeria and has assumed the cost of providing new lives for them in this country. Nothing in international law provides an immunity from civil liability for perpetrators and abettors of these violations found in the United States.

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[31] *See, e.g.*, Steve LeVine, *Can Goodluck Jonathan Survive Nigeria's Oil Wars?*, Foreign Pol'y, Nov. 30, 2010 http://oilandglory.foreignpolicy.com/posts/2010/11/30/can_goodluck_jonathan_survive_nigerias_oil_wars; Sebastian Junger, *Blood Oil*, Vanity Fair, Feb. 2007 http://www.vanityfair.com/politics/features/2007/02/junger200702.

Indeed, one of the fundamental principles recognized in the *Filartiga* line of cases is that the United States should not be a safe haven for perpetrators of human rights violations. Due process requires that a corporation have substantial contacts with the United States before it can be subjected to the general jurisdiction of our courts. Once such contacts exist, corporations are subject to *in personam* jurisdiction in federal court for transitory tort suits, contingent upon the application of other doctrines (e.g. forum non conveniens) limiting such jurisdiction, and, in ATS cases, the substantive limitations established in *Sosa* itself.

Given the grave nature and consequences of severe human rights violations, international law does not restrict the sovereign power of States to provide remedies for these violations. The ATS is thus fully consistent with international law[32] and the basic principle that States are free to respond to such violations as they choose absent specific, agreed upon limitations on State action. The notion that it would violate international law to enforce international law in this manner is fanciful.

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[32] Indeed, customary international law obliges States, in some circumstances, to provide effective remedies for victims of human rights abuses. *See generally Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147, Annex, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

C. State Practice Demonstrates the Absence of Any International Law Limitation on the Availability of Civil Remedies for Human Rights Violations Arising in the Territory of Foreign Sovereigns.

The decision to adjudicate transitory tort claims arising from conduct committed within the territory of a foreign State is left to the discretion of each State's domestic legal system. Significantly, the domestic legal systems of the United Kingdom, the Netherlands and Germany, the three foreign States which have filed *amicus* briefs in support of respondents, each provide a forum for tort claims of the kind asserted by plaintiffs in this case.

While the specific contours of jurisdiction under the ATS may differ from the civil remedies available in other States by virtue of the federalism concerns that undergird the statute and other unique aspects of U.S. law, ATS jurisdiction is not clearly broader and in some ways is significantly narrower than the jurisdiction exercised by foreign courts.

A Dutch court recently demonstrated this fact by accepting jurisdiction over claims by Nigerian villagers against a subsidiary of Shell, which has no presence in the Netherlands, for alleged conduct in Nigeria. Rb. Gravenhage [Court of the Hague] 30 december 2009, JOR 2010, 41 m.nt. Mr. RGJ de Haan (Oguro/Royal Dutch Shell PLC) (Neth.).

British courts regularly exercise jurisdiction over extraterritorial tort claims arising out of conduct within foreign States, as long as the defendant can be found in the United Kingdom.[33] These cases are no different from the tort claims permitted in ATS cases.

German courts, as well as the courts of Austria, Sweden, Finland, and Japan, rely on a civil procedure provision establishing material jurisdiction based solely on the presence of some of the defendant's property in their respective territories. Zivilprozessordnung [ZPO][Code of Civil Procedure], Jan. 30, 1877, Reichsgesetzblatt [RGBl.] § 23 (Ger.). The German courts have recently imposed a modest additional nexus requirement for this type of jurisdiction based upon an analysis of statutory intent, but saw no problem in extending such jurisdiction under international law. *See* Bundesgerichtshof [BGH][Federal Court of Justice] July 2, 1991, Neue Juristische Wochenschrift [NJW] 3902, 1991 (Ger.).

Domestic courts in all European Union states may consider claims arising from foreign conduct against foreign defendants who have *no connection to the forum*, so long as they are co-defendants with a locally domiciled defendant and it would promote judicial efficiency to hear the claims together.

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[33] The United Kingdom provides corporate liability for torture under its common law torts, and other domestic legislation. *See, e.g., Guerrero v. Monterrico Metals PLC*, [2009] EWHC (QB) 2475 (Eng.).

Council Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 6(1), 2001 O.J. (L 12) 4-5 (EC).

Many countries exercise jurisdiction over foreign conduct and foreign defendants based on *forum necessitatis* — where justice is unavailable elsewhere. A Dutch civil court recently invoked this provision in a case involving the torture of Palestinian doctors by Libyan government officials. Rb.Gravenhage [Court of First Instance of the Hague] 21 maart 2012, m. nt. VanderHelm (El-Hojouj/Derbal)(Neth.), http://www.rechtspraak.nl.

The widespread State practice involving the consideration of extraterritorial claims by domestic courts in various legal systems illustrates the deference international law pays to the domestic legal mechanisms in each State. This State practice also belies any claim that there is a categorical prohibition in international law that restricts the territorial scope of ATS jurisdiction.

The forum in which ATS-type claims are adjudicated varies from legal system to legal system. These fora include civil, criminal,[34] or administrative

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[34] *See, e.g.*, Wetboek van Strafrecht (Criminal Code) art. 51 (Neth.); Criminal Code, R.S.C. ch. C-46, § 2 (1985) (Can.) (defining "person" to include an organization); Criminal Procedure Act 51 of 1977, § 332 (S. Afr.); *Criminal Code Act 1995* (Cth) s 12.1 (Austl.).

penalties — and the conduct at issue may be defined as a tort, a crime or, in some cases, as a violation of international law. Many countries provide for civil liability against corporations and individuals for egregious conduct, including for conduct occurring outside the country exercising jurisdiction over the corporation.[35]

Given the range of international practice, any argument that international law limits the authority of sovereign States to enforce international human rights law by asserting jurisdiction over claims based on conduct arising in the territory of foreign States is plainly wrong. There can be no doubt that the United States may exercise jurisdiction over claims

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[35] *See, e.g., Guerrero v. Monterrico Metals PLC* [2009] EWHC (QB) 2475 (Eng.) (case on behalf of Peruvians detained and tortured while protesting at copper mine); *Hiribo Mohammed Fukisha v. Redland Roses Ltd.* [2006] KLR Civil Suit 564 of 2000 (Kenya) (case filed in Kenya in which tort law provided the remedy for serious bodily harm caused by exposure to hazardous chemicals when spraying herbicides and pesticides); *Lubbe v. Cape PLC*, [2000] UKHL 41, [2000] 1 W.L.R. 1545 (H.L.) (appeal taken from Eng.) (claims for damages for more than 3,000 miners who claimed to have suffered as a result of exposure to asbestos and its related products in the English defendant corporation Cape's South African mines); *Dagi v. BHP Co.* [2000] VSC 486 (Austl.) (suit in the Supreme Court of Victoria, Australia by 30,000 natives of Papua, New Guinea, against a mining company for damages to their lands); *see also* Robert C. Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 Geo. Wash. Int'l L. Rev. 841, 887 (2009).

such as those alleged by plaintiffs against these defendants without violating international law.

D. Universal Jurisdiction Supports ATS Jurisdiction for *Sosa*-Qualifying Norms.

The international law violations in this case are subject to universal jurisdiction, thereby providing an additional international law basis for the assertion of ATS jurisdiction. Thus, even if this Court found that the ATS was an exercise in prescriptive jurisdiction, extraterritorial application of the ATS as approved in *Sosa* would be fully consistent with international law.

All States have the right to apply even their own criminal law to abuses for which there is universal jurisdiction. *See Sosa*, 542 U.S. at 762–63 (Breyer, J., concurring).[36] These include the prohibitions against torture, extra-judicial execution, prolonged arbitrary detention and crimes against humanity, the claims brought by plaintiffs in this

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[36] The *Sosa* Court was urged to limit ATS jurisdiction by imposing international law limits on the exercise of prescriptive jurisdiction to the ATS. Brief of *Amicus Curiae* European Commission In Support of Neither Party (No. 10-1491) at 12, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 177036. *Sosa* did not adopt this proposal, though *Sosa*'s "historical paradigm" test imposes similar limitations on ATS jurisdiction. Notably, the European Commission did not object to ATS jurisdiction based on accepted principles of jurisdiction, including universal jurisdiction. *Id.* at 13–14.

case.[37] *See* Restatement Third § 404 cmt.b ("In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy."); *see also* 1 Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law* 469–70, n.23 (9th ed. 1992) (recognizing universal jurisdiction over certain offenses and citing *Filartiga*).[38]

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[37] In addition, the United States may apply its substantive laws to the extraterritorial conduct of U.S. citizens. Restatement Third § 402(2). Thus, ATS actions against U.S. corporations and their subsidiaries for conduct arising within foreign States concededly do not violate international law. *See Chevron Amicus Br.* at 11. (prescriptive jurisdiction is recognized when there is a "nexus between the activity or persons regulated and the regulating nation"); Brief of the Governments of the United Kingdom and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents at 30 (No. 10-1491) (filed Feb 3, 2012) ("[I]nternational law permits the exercise of prescriptive jurisdiction in relation to the conduct of [U.S.] citizens, wherever located[.]"). There is no doubt that the U.S. has the authority to regulate the conduct of its citizens, individual or juridical, no matter where that conduct occurs. *See Blackmer v. United States*, 284 U.S. 421, 436 (1932) ("By virtue of the obligations of citizenship, the United States retained its authority over [the defendant], and he was bound by its laws made applicable to him in a foreign country.").

[38] *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 306 (2d Cir. 2003) ("[S]tates may exercise universal jurisdiction over acts committed in violation of *jus cogens* norms. This universal jurisdiction

The violations alleged by plaintiffs in this case — aiding and abetting torture,[39] extra-judicial execution,[40] prolonged arbitrary detention,[41] and crimes against humanity[42] — are norms of concern to

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extends not merely to criminal liability but may also extend to civil liability."); *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) ("Although the jurisdiction authorized by section 404 is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies . . . such as the tort actions authorized by the Alien Tort Act.").

[39] *Filartiga*, 630 F.2d at 890 ("[T]he torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."); *see also* Restatement Third § 702 cmts. n, o (prohibition of torture is *jus cogens* and violations of the prohibition of torture "are violations of obligations to all other states").

[40] *See Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 203 (Nov. 25, 2006) (finding that extrajudicial killings are "serious breaches [that] violate the international *jus cogens*").

[41] *See* Restatement Third § 702(e) cmt. n, (defining *jus cogens* to include "prolonged arbitrary detention").

[42] *See* Amnesty Int'l, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, AI Index IOR 53/004/201 (Oct. 2011) (noting that as of 1 September 2011, "at least 90 . . . UN member states have included at least one crime against humanity as a crime under national law and at least 78 . . . UN member states have provided for universal jurisdiction over such crimes"); *see also* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & Contemp. Probs. 63, 68 (1996) ("[T]he following international crimes are *jus cogens*: aggression, genocide, crimes

all States enabling States to assert jurisdiction over such conduct based on the universality principle no matter where the violations occur. Thus, Congress may provide jurisdiction so that the federal courts can enforce these norms.

Civil remedies in universal jurisdiction cases are widely understood to be a crucial part of the remedial scheme for human rights victims. *See generally*, Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142 (2006). Indeed international law — as evidenced by the practice of States, human rights instruments, and the International Criminal Court — obligates States to afford an effective remedy to human rights victims. *See supra* § III(C).

Many legal systems permit the recovery of monetary compensation by the victim as part of the criminal prosecution of the wrongdoer. Thus, domestic criminal statutes based on universal jurisdiction over extraterritorial human rights crimes are usually accompanied by civil remedies for the victims of the same human rights violations. *Sosa*, 542 U.S. at 762–63 (Breyer, J., concurring).

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against humanity, war crimes, piracy, slavery and slave-related practices, and torture.").

IV. THE FEDERAL COURTS HAVE ADEQUATE TOOLS AT THEIR DISPOSAL TO DISMISS INAPPROPRIATE ATS CASES.

Sosa ensures that courts recognize as actionable only a narrow set of universally-recognized international law violations. Initially, of course, the allegations must meet the strict pleading requirements of *Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009). Moreover, any concerns about the appropriateness of asserting federal jurisdiction over particular ATS claims that remain after the application of *Sosa*'s demanding threshold test are adequately addressed by existing doctrines designed to manage such issues in transnational cases.[43] Indeed, many ATS cases have failed to survive the application of these doctrines.[44]

Given the Founders' goal of providing a federal forum for torts committed in violation of the law of nations and the important purposes advanced by the

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[43] Foreign sovereign immunity and the political question and act of state doctrines may apply in some ATS cases arising out of conduct on foreign soil. *See Sosa*, 542 U.S. at 732 n.21.

[44] *See, e.g., Corrie v. Caterpillar*, 503 F.3d 974, 980-84 (9th Cir. 2007) (political question); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 51–53 (D.C. Cir. 2005) (political question); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-39 (11th Cir. 2004) (comity); *see also Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010) (rejecting a claim of sovereign immunity under the Foreign Sovereign Immunities Act by an individual defendant in a case arising in Somalia, but leaving open the possibility of a common law defense of foreign immunity).

ATS, the appropriate means of managing ATS litigation is to utilize the tools already available to courts rather than to graft a novel territorial limitation onto the ATS that is unknown in U.S. and international law and that Congress has not seen fit to impose.

Personal Jurisdiction – At the outset, ATS claims can only proceed if a plaintiff can establish that a U.S. court has personal jurisdiction over the defendant. This requirement provides a significant barrier in cases brought against foreign defendants for events arising in a foreign country. In corporate ATS cases, personal jurisdiction will only be available where the corporate defendant is engaged in substantial business in the United States or the particular claim arises from contacts with the forum. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (introducing goods into the "stream of commerce" insufficient to establish general jurisdiction); *see also, J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011).

The due process requirements of "fair play and substantial justice" established in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and the "reasonableness" requirements in *Shaffer v. Heitner*, 433 U.S. 186, 203–04 (1977), essentially mirror the basic international law requirements for the exercise of adjudicative jurisdiction. Restatement Third § 421 and Reporters' Notes 1, 2. These limitations ensure that defendants with tenuous connections to the United States are not subjected to suit in our courts.

See, e.g., Doe v. Unocal Corp., 248 F.3d 915, 930–31 (9th Cir. 2001) (affirming dismissal for lack of personal jurisdiction over French oil corporation).

In this case respondents did not move to dismiss based on a lack of personal jurisdiction and waived this defense.[45] Thus, there is no record from which this Court could determine that the exercise of personal jurisdiction in this case was unreasonable.

Forum Non Conveniens – Even if personal jurisdiction exists, ATS defendants may seek dismissal based upon the forum non conveniens doctrine where a foreign court is "the more appropriate and convenient forum for adjudicating the controversy." *Sinochem Int'l Co. v. Malaysian Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007); *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). *Piper* established a two-part inquiry: First, the court decides whether an adequate alternative forum exists, and then it weighs public and private interests implicated in the case to determine if the balance favors dismissing the case to the alternative forum. *Piper*, 454 U.S. at 241. The *Piper* analysis is uniquely suited to the determination of whether particular ATS cases should be heard in a foreign forum, since it considers factors such as relative access to proof;

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[45] Respondents' Nigerian subsidiary was dismissed for lack of personal jurisdiction. *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-7618, 2010 WL 2507025, at *10 (S.D.N.Y. June 21, 2010).

local interest in having controversies decided, and the court's familiarity with the applicable law. *See Sinochem*, 549 U.S. at 429–30; *Gilbert*, 330 U.S. at 508–09.

In some ATS cases there may be no other available or feasible forum and so an ATS case may be the only prospect for redress. *See, e.g., Licea v. Curacao Drydock Co.*, 537 F. Supp. 2d 1270, 1274 (S.D. Fla. 2008) (Cuban plaintiffs would be in danger if forced to litigate in Curaçao where they had been subjected to slavery-like conditions); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 335–36 (S.D.N.Y. 2003) (Sudan was not adequate alternative forum as the Sudanese government was engaged in a campaign of genocide against plaintiffs).

However, a number of ATS cases have been dismissed on forum non conveniens grounds. *See, e.g., Aldana v. Del Monte Fresh Produce N.A.*, 578 F.3d 1283 (11th Cir. 2009); *Mastafa v. Australian Wheat Bd.*, No. 07-CV-7955, 2008 WL 4378443, at *9–10 (S.D.N.Y. Sept. 25, 2008); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002). The forum non conveniens doctrine implements the goals of the First Congress in providing a federal forum for aliens harmed by international law violations, while respecting the sovereign rights of other nations.[46]

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[46] *Sosa* indicated that the Court would also consider an exhaustion of local remedies requirement in an appropriate case. *Sosa*, 542 U.S. at 733 n.21. Exhaustion is analogous to

Respondents did not bring a forum non conveniens motion in this case.[47] Thus, the district court did not have the opportunity to consider whether plaintiffs' U.S. residence and asylum status weighed in favor of the exercise of jurisdiction in this case. However, the defense remains viable in other ATS cases and is the established doctrine most responsive to concerns that a particular case should be litigated in another more appropriate forum.

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forum non conveniens because both doctrines turn on the availability of an adequate and available alternative forum. The exhaustion of remedies doctrine in international law is designed to require recourse to a domestic forum before taking a case to an international forum so it would not ordinarily apply in domestic tort litigation. *See* Restatement Third § 713 cmt. f. Congress included an exhaustion requirement in the TVPA. The circuits are split on the applicability of an exhaustion requirement in ATS cases. *Compare Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 830–31 (9th Cir. 2008) (imposing a prudential exhaustion requirement) *with Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) ("[T]he exhaustion requirement does not apply to the ATCA"); *see also Exxon*, 654 F.3d at 26–27 (acknowledging the possibility of such a defense but declining to apply the doctrine in light of a district court finding of futility). Respondents have not raised this doctrine in this action.

[47] The Second Circuit rejected the application of forum non conveniens in a prior case based on similar claims. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 108 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001). In *Wiwa*, the Second Circuit found that the district court had failed to take into account adequately the U.S. interest in providing a forum for human rights victims. *Id.* at 105. The Court also found that the district court failed to adequately take into account the U.S. residence of some plaintiffs. *Id.* at 103.

International Comity – The international comity doctrine is a further safeguard against the inappropriate assertion of ATS jurisdiction in particular cases. International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164 (1895). Abstention based on comity may safeguard against the inappropriate assertion of ATS jurisdiction in particular cases, where foreign proceedings are pending or where a foreign nation has acted in favor of a local resolution. *See Ungaro-Benages v. Dresdner Bank AG,* 379 F.3d 1227, 1237–39 (11th Cir. 2004) (deferring to resolution of dispute in a foreign forum). In deciding whether to abstain from exercising jurisdiction, courts weigh, on a case-by-case basis, the interests of our government, the foreign forum, and the international community, as well as the adequacy of the alternative forum. *Id.* at 1238. *See also Bigio v. Coca-Cola Co.,* 239 F.3d 440, 453–55 (2d Cir. 2000).

V. CLAIMS OF ALLEGED MISUSE OF ATS LITIGATION CANNOT CONSTITUTE A BASIS FOR A CATEGORICAL TERRITORIAL LIMITATION ON THE SCOPE OF THE STATUTE.

Respondents' *amici* attack ATS litigation against corporate defendants across the board based on the unproven assertion that such litigation is generally frivolous and constitutes legalized extortion. *See, e.g.*, Brief of Products Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Respondents at 2, 21 (No. 10-1491) (filed Feb. 3, 2012). These *amici* challenge (and often misstate) the factual accuracy of the allegations made in ATS cases, in particular the role of the defendants in the alleged violations, but neither the parties nor this Court are in a position to evaluate such claims about cases not before this Court. Thus, based solely on the assertion that ATS cases are expensive to litigate, time-consuming or embarrassing for their members, *amici* ask the court to preclude all extraterritorial ATS claims, even factually supported claims for such crimes as genocide and torture. An array of the largest, most profitable corporations in the world thus ask this Court to create a blanket immunity from tort liability for human rights violations they commit or abet outside the United States.

In fact, ATS cases raise issues no different from those raised by any other body of complex transnational litigation. *See Flomo*, 643 F.3d at

1018 (tort liability is an ordinary cost of doing business). In making such assertions about the cost of litigation, *amici* take issue not with the ATS, but with the Federal Rules of Civil Procedure that provide the well-established mechanisms by which courts dismiss nonviable claims, including, at the outset of litigation, through the rigorous pleading requirements of *Iqbal*.

Amicis' arguments are addressed to the wrong forum. It is up to Congress to decide whether litigation under a particular law is more costly than beneficial, and if so it is up to Congress to decide how to address it. Congress has never acted to restrict ATS jurisdiction since 1789, even though *Sosa* made it clear that Congressional guidance would be welcome. *Sosa*, 542 U.S. at 731. Rather, Congress has only acted to augment the ATS through the adoption of the TVPA.

Moreover, it is undeniable that there have been relatively few corporate ATS cases (or ATS cases generally) since *Filartiga*. The majority of these cases have been screened out by the mechanisms discussed above or on other bases. A handful of cases have gone to trial or have been settled. A modest number of cases remain pending awaiting the outcome of this case.

There are good reasons why a case like this one belongs in a United States court under the ATS. Plaintiffs indisputably have tort claims against these respondents. Plaintiffs were forced to flee Nigeria

because of the human rights violations at the center of this case. They were all U.S. residents and all had received political asylum here when the case was filed. There is no serious argument that plaintiffs could have brought their claims in Nigeria given the persecution they faced there. Respondents have a sufficient presence in the United States to be subject to suit in our courts consistent with due process and international law.

The ATS provides a federal forum to plaintiffs so long as their tort claims are *Sosa*-qualifying violations of the law of nations and other established case-specific doctrines are satisfied. Granting plaintiffs access to federal courts so that their claims of torture, extra-judicial execution, prolonged arbitrary detention and crimes against humanity can be heard in some forum is faithful to the Founders' design and purpose in enacting the ATS.

CONCLUSION

For all these reasons, this Court should reverse the judgment below and find that there are no categorical territorial limitations on ATS jurisdiction.

Dated: June 6, 2012

Respectfully Submitted,

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APPENDIX A

Transcription from Original
[Letter From George Hammond (June 25, 1795)]

The Undersigned Minister Plenipotentiary of His Britannic Majesty has received instructions to lay before the Government of the United States the inclosed memorial[s] from the acting Governor of the British colony of Sierra Leone on the coast of Africa, and from the Agent of Mess^{rs} John and Alexander Anderson, Proprietors of Bance Island on the same Coast.

The Undersigned in communicating this Paper to the Secretary of State does not think it necessary to dwell either on the nature or the importance of the particular transactions which are there stated.

He would not however do Justice to the friendly dispositions of his Court, or to the principles upon which the present political relations of the two Countries are established, if upon an occasion of so serious, and in its extent of so unprecedented a nature, he were not to remark that the line of forbearance hither to pursued by His Majesty under the circumstances of similar though less aggravated offences cannot be considered as applicable to the present case.

The Citizens of the United States mentioned in the inclosed papers, if they were not originally the authors of the expedition against the Settlements at Sierra Leone, have taken so decided and leading a

part in the business, that the French crews and vessels employed on the same occasion, appear rather in the light of Instruments of hostility in their hands than as Principals in an enterprise undertaken against the Colony of a Power with whom France only was at war.

The forbearance hitherto shewn by the British government towards those citizens of the United States who have been found in the actual commission of acts of hostility against His Majesty's subjects has proceeded partly from an unwillingness to carry to their full extent against the Individuals of a friendly nation measures of severity which would however have been justified by the indisputable Laws of Nations, and partly from the persuasion that these acts however frequent have arisen at least in some degree from an ignorance on the part of the persons concerned, with respect to the extent of the crime which they were committing, and of the consequences to which they were making themselves liable. But even the Circumstance of that forbearance entitles His Majesty to expect that more attention will be paid to His representations on the occasion of a transaction of the nature and extent of that complained of, in this memorial. It might be stated with truth that under all the circumstances of the Case these proceedings could hardly have been [justified?] even by any state of hostility between two countries who had felt a common interest in the cause of humanity and in the general welfare of mankind: How much more reason is there then for complaint when these acts are committed by the Citizens of a Power with whom His Majesty is living on terms of

perfect Amity, and towards whom He had been anxious to shew every degree of attention and friendship. On all these grounds this case must be felt to be of a nature, which calls for the most serious attention of both governments; and the rather, because it appears by other accounts which have been received by the British government that similar practices are daily multiplying in the West Indies and elsewhere. The King is confident that the United States will feel the necessity of adopting the most vigorous measures with a view to restrain in future such illegal and piratical aggressions which must be as repugnant to the wishes and intentions of the American governments as they are contrary to all the principles of Justice and all the established rules of neutrality. And His Majesty trusts on the present occasion, that to the ample indemnification of the parties aggrieved will be added such exemplary punishment of the offenders as may satisfy the just claims of the British government, and secure to the two Countries the uninterrupted enjoyment of that intercourse of friendship and good understanding, which proceedings of the nature complained of have so obvious a tendency to disturb.

Geo. Hammond

Philadelphia
25 June 1795

APPENDIX B

Transcription from Original [Memorial of Zachary Macaulay and John Tilly]

To the Right Hon^{ble} Lord Grenville
one of his Majesty's principal Secretary's of State.

The Memorial of Zachary Macaulay acting Governor of the Hon^{ble} the Sierra Leone Company's Colony of Sierra Leone on the coast of Africa, and of John Tilley Agent of Mess^{rs} John and Alexander Anderson, Merchants in London, and proprietors of Bance Island an establishment, on the said coast, Sheweth

That on the 28th of September last a french fleet consisting of, one fifty gun ship, two frigates, two armed brigs, with several armed prizes, did enter the river Sierra Leone, and did take the Hon^{ble} the Sierra Leone Company's chief establishment of Freetown, and also Bance Island the establishment as is stated above of Mess^{rs} John and Alexander Anderson's

That contrary to the existing neutrality between the British and American Governments, certain American subjects trading to this coast, did voluntarily join themselves to the French fleet, and were aiding and abeting in attacking and destroying the property of British subjects at the above named places and elsewhere, as your memorialists will take the liberty of stating more particularly to your Lordship.

That an American Subject of the name of David Newell, commanding a schooner called the Massachusetts belonging to Boston in the state of Massachusetts, the property as your Memorialists believe of Daniel Macneil a Citizen of Boston in the said state of Massachusetts, did with the consent and concurrence of the said Daniel Macneil who was then and there present, voluntarily assist in piloting the said french fleet from the Isle de Loss to the river Sierra Leone.

That when the French had taken Freetown, the said David Newell, did land there with arms in his hands and at the head of a party of French soldiers, whom he conducted to the house of the acting Governor one of your memorialists

That the said David Newell did make use of violent and threatening language towards your said memorialists and others, declaring aloud that it was now an American war, and he was resolved to do all the injury in his power to the persons and property of the inhabitants of Freetown.

That the said David Newell was active in exciting the French soldiery to the commission of excesses, and was aiding and abetting in plundering of their property the Hon^{ble} the Sierra Leone Company and other individuals British subjects.

That on the same day, namely, the 28th day of Sept^{r} last the said David Newell, did assist in piloting a French frigate up the River Sierra Leone to Bance Island, which place was attacked by the said frigate

and two other vessels, and on the 30th day of September was taken and destroyed

That as a reward to the said Daniel Macneil and to the said David Newell for their services, the French Commodore did deliver to the said David Newell on board the Schooner commanded by him called the Massachusetts a considerable quantity of goods, which had been the property of British subjects.

That another American subject of the name of Peter William Mariner, who during the last war had acted has [sic] a Lieutenant on board of one of his Majesty's ships but now commanding a Schooner, belonging to New-York called the ---- the joint property as your memorialists believe, of Geo Bolland late of the Island of Bananas, on the coast of Africa, a British subject and ---- Rich a citizen of New-York did in like manner voluntarily assist in conducting the said French fleet from the Isle de Loss to the river Sierra Leone.

That the said Peter Wm Mariner did also land at Freetown in company of the French with arms in his hands and was exceedingly active in promoting the pillage of the place.

That the said Peter Wm Mariner was more eager in his endeavors to injure the persons and property of British subjects than the French themselves, whom he the said Peter Wm Mariner instigated to the commission of enormities by every means in his power, often declaring that his heart's

desire was to wring his hands in the blood of Englishmen.

That on the 29th day of Septr last the said Peter Wm Mariner did voluntarily go in a sloop commanded by him, and carrying American colours in pursuit of a sloop belonging the said Messrs John and Alexander Anderson of London, which had taken refuge in Pirat[e]'s bay, in the River Sierra Leone. That on the same day, the said Peter Wm Mariner did seize the said sloop and did deliver her up as a prize to the French Commodore.

That the said Peter Wm Mariner did receive from the French Commodore as a reward for his exertions a Cutter which had been the property of the Honble the Sierra Leone Company called the Thornton together with a considerable quantity of goods, which had been the property of British subjects.

That the said Peter Wm Mariner did also carry off from Freetown and apply to his own use a great variety of articles the property of British subjects; particularly a library of books belonging to the Honble the Sierra Leone Company, which there is reason to believe would not have been carried off by the French.

That on the 7th day of Octr last the said Peter Wm Mariner did receive on board the said Cutter Thornton commanded by him, a number of armed Frenchmen, with whom and in company of a French armed brig, he did voluntarily go in pursuit of a ship in the offing, which proved to be the Duke of

Bucclugh of London John Maclean Master. That by the orders of the said Peter W^m^ Mariner, a boat belonging to the said Duke of Bucclugh was seized, and the chief mate of the said Duke of Bucclugh who was on board the boat made prisoner.

That the said Peter W^m^ Mariner did hail the said Duke of Bucclugh and did desire the said John Maclean to strike his colours, and to surrender to the said Cutter Thornton which he the said Peter W^m^ Mariner commanded. That on the said John Maclean refusing to strike the said Peter W^m^ Mariner did fire a four pound shot at the said Duke of Bucclugh.

That on the 9^th^ day of Oct^r^ last, the said Peter W^m^ Mariner did in the said Cutter Thornton commanded by him voluntarily accompany three French vessels in pursuit of the Ship Harpy of London Daniel Telford Master, which ship they captured.

That the said Peter W^m^ Mariner did shew himself on all occasions the determined and inveterate enemy of British subjects; and was a cause together with the beforementioned persons Daniel Macneil and David Newell of considerably more injury being done to British property on this coast, than without their aid could have been done.

That your memorialists are ready to produce legal evidence of [the] above facts, which they submit to your Lordship's judgment in the confidence that they will be taken into serious consideration both that the parties concerned may obtain such redress

as is to be had and that such wanton aggressions on the part of subjects of a neutral government may meet their due punishment.

That in confirmation of the above your memorialists do affix to these presents which are contained on this and the nine preceding pages their hands and seals at Freetown this 28th day of Novr 1794.

Signed Zachary Macaulay (LS)
John Tilley (LS)